87-2068

No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALABAMA POWER CO., *et al.*, UNITED MINE WORKERS OF AMERICA, ORMET CORPORATION, AND NATIONAL COAL ASSOCIATION,
Petitioners,

v.

LEE M. THOMAS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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June 17, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the notice requirement in § 4 of the Administrative Procedure Act, 5 U.S.C. § 553 (1982), is satisfied when an agency adopts a final rule that was suggested in or flows from a public comment that called for a fundamentally different rule than the agency proposed?

2. Whether an agency can avoid the obligation imposed under the Administrative Procedure Act to provide record support for a factual finding relied upon as the basis for a final rule whenever the agency includes an "exceptions" or "safety valve" procedure that purportedly allows a regulated party to seek a case-specific waiver of the rule?

PARTIES TO THE PROCEEDINGS

This case involves challenges to final regulations promulgated by the United States Environmental Protection Agency (EPA) pursuant to § 123 of the Clean Air Act, 42 U.S.C. § 7423 (1982). Petitioners Alabama Power Co., 63 other electric utilities,* Edison Electric Institute, National Rural Electric Cooperative Association, and American Public Power Association were petitioners in No. 85-1543 below. Petitioner Ohio Power Company was petitioner in No. 85-1556. Petitioner Ormet Corporation was petitioner in No. 85-1558. Petitioner National Coal Association was petitioner in No. 85-1560. Petitioners Monongahela Power Co. and Potomac Edison Co. were petitioners in No. 85-1557. Petitioner United Mine Workers of America was petitioner in No. 85-1568.

Other petitioners below were the Natural Resources Defense Council and Sierra Club (No. 85-1488), the States of New York, Rhode Island, Connecticut, Vermont, Maine, and New Hampshire, and the Commonwealth of Massachusetts (No. 85-1489), the State of New Jersey (No. 85-1554), and the Environmental Defense Fund (No. 85-1552). Pursuant to Rule 19.6 of this Court, these other petitioners below are Respondents in this Court. Respondents Lee M. Thomas, EPA Administrator, and EPA were respondents in each of the proceedings below. The proceedings were consolidated on October 25, 1985.

Intervening on behalf of respondents in one or more of the cases filed below by Petitioners here were the American Paper Institute, National Forest Products Association, Natural Resources Defense Council, and Sierra Club. Intervening on behalf of the respondents

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* A list of the individual companies that comprise Petitioners Alabama Power Co., *et al.*, and all parent companies, subsidiaries, and affiliates is contained in the supplemental appendix attached to this Petition pursuant to Rule 28 of this Court. Ormet Corporation is a wholly owned subsidiary of Ohio River Associates, Inc.

below in other petitions were Alabama Power Co., *et al.* (Nos. 85-1488, 85-1489, 85-1552, 85-1554), the American Paper Institute and National Forest Products Association (intervenors on all other petitions), the National Coal Association (Nos. 85-1488, 85-1489, 85-1552, 85-1554), Kennecott (Nos. 85-1488, 85-1489, 85-1552), the Natural Resources Defense Council and Sierra Club (intervenors on all other petitions except No. 85-1488), and the State of Ohio (No. 85-1488). Pursuant to Rule 19.6 of this Court, all intervenors below other than Petitioners here are Respondents in this Court. Participating below as *amici curiae* in support of respondents on certain issues raised in Nos. 85-1488, 85-1489, 85-1552, and 85-1554 were the States of Indiana, Mississippi, and Georgia.

Two other consolidated petitions for review, one filed by Ohio Power Co. (No. 86-1331) and the other filed by Ormet Corporation (No. 86-1362), were decided in the same judgment of the court below as the preceding petitions. These two petitions, which were not consolidated with Nos. 85-1488, *et al.*, sought review of EPA's denial of an administrative petition for reconsideration of certain of the § 123 regulations. The respondents in that proceeding were also Lee M. Thomas, Administrator, and EPA. The Natural Resources Defense Council and Sierra Club intervened on behalf of EPA in both petitions. Pursuant to Rule 19.6 of this Court, respondents and intervenors in these petitions below are Respondents in this Court.

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Alabama Power Co., 63 other individual electric utilities,[1] Edison Electric Institute, National Rural Electric Cooperative Association, American Public Power Association, United Mine Workers of America, Ormet Corporation, and National Coal Association respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on January 22, 1988.

OPINION BELOW

The opinion of the U.S. Court of Appeals in *Natural Resources Defense Council, et al. v. Thomas, et al.*, Nos. 85-1488, *et al.* (D.C. Cir. January 22, 1988), is reported at 838 F.2d 1224. A copy of the opinion appears in the

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[1] The 64 individual utility petitioners and their parent companies, subsidiaries, and affiliates are set forth in the supplemental appendix attached to the Petition pursuant to Rule 28 of this Court. Ormet Corporation is a wholly owned subsidiary of Ohio River Associates, Inc.

Appendix (hereinafter referred to as "App. —") at 1a-64a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the D.C. Circuit was entered on January 22, 1988.[2] Three timely Petitions for Rehearing and Suggestions for Rehearing *En Banc*, and two timely Petitions for Rehearing, were denied on April 13, 1988, App. 65a-68a. This petition for a writ of certiorari is being filed within ninety days of that date pursuant to 28 U.S.C. § 2101(c) (1982) and Rules 20.2 and 20.4 of this Court. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory and regulatory provisions are set forth in the Appendix:

1. Clean Air Act §§ 110(a)(1)-(a)(2)(K), 123, 42 U.S.C. §§ 7410(a)(1)-(a)(2)(K), 7423 (1982), App. 172a-177a.

2. 49 Fed. Reg. 44878-44887 (1984) (Proposed Stack Height Regulations), App. 134a-171a.

3. 50 Fed. Reg. 27892-27907 (1985), recodified at 40 C.F.R. §§ 51.100(ff)-(kk) (1987) (Final Stack Height Regulations), App. 71a-133a.

4. Administrative Procedure Act §§ 4, 10(e), 5 U.S.C. §§ 553, 706 (1982), App. 178a-180a.

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[2] The court below had jurisdiction of these cases under § 307 (b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1) (1982), which provides the District of Columbia Circuit with exclusive jurisdiction to review any "nationally applicable regulations . . . promulgated by the Administrator . . . ."

STATEMENT OF THE CASE

This case concerns two fundamental principles of administrative law that are important in virtually all informal rulemaking proceedings conducted by EPA and other federal agencies. It arises in the context of EPA's implementation of § 123 of the Clean Air Act.[3]

First, the D.C. Circuit in this case held that an agency is not required by the Administrative Procedure Act (APA) to provide notice of a rule in its rulemaking proposal so long as the final rule was suggested in or flows from a public comment that called for a fundamentally different rule than the agency proposed. Second, the court's decision establishes the novel principle that a federal agency may promulgate a final rule without record support for the factual finding asserted as the basis for the rule, so long as that rule contains a "safety valve" or "exceptions" procedure that purportedly allows a regulated party to seek a case-specific waiver of the rule.

I. THE STATUTORY CONTEXT OF THIS CASE

Sections 109 and 110 of the Clean Air Act establish a system of regulation of ambient pollutant concentrations that is based upon "National Ambient Air Quality Standards" ("ambient standards") and "Prevention of Significant Deterioration" increments ("PSD increments").[4]

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[3] 42 U.S.C. § 7423 (1982), App. 176a-177a. The Clean Air Act, 42 U.S.C. § 7401, *et seq.* (1982), will be referred to as "CAA" or "the Act." For convenience, all further citations will be to the Act. Parallel citations to the U.S. Code are given in the Table of Authorities.

[4] The ambient standards define maximum ground level concentrations of pollution which, if attained, will assure protection of public health and welfare. CAA §§ 108, 109. The PSD increments define the maximum increases in ground level concentrations that are allowed to occur as a result of new construction in areas where the ambient standards are met. CAA § 163.

Under the Act, EPA is also authorized to establish technology-based emission standards that apply only to new sources and that must be met without regard to the impact of the new source on ambient air quality. For example, under § 111, new source performance standards (NSPS) define an emission level that reflects

> the degree of emission reduction achievable through the application of the best system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated for that category of [new] sources.[5]

While NSPS prescribe a level of control that must be met regardless of a source's ambient air quality impacts, emission limitations developed pursuant to § 110 are based upon a source's ambient impacts. Thus, under § 110 of the Act, the states must set emission limitations for individual sources to ensure that their emissions will not cause or contribute to ground-level pollutant concentrations that exceed the ambient standards or PSD increments.

Dispersion of emissions from the point of release to ground level where people breathe is integral to the operation of the § 110 state programs. If emissions from a fuel burning facility were released at ground level, they could create pollutant concentrations that exceed ambient air quality standards and PSD increments by factors of many thousands.[6] In other words, for there to be in-

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[5] CAA § 111(a)(1)(C). Under § 111(a)(2), a "new source" is one that commenced construction after proposal of an applicable NSPS.

[6] For example, if the emissions from a well-controlled source (e.g., a power plant meeting the stringent EPA new source stand-

dustrial activity that does not threaten public health, there must be dispersion. Under the § 110 programs, the amount of dispersion will govern the type of fuel a source can use, what control technologies the source must install, and where the source can be built consistent with the protection of public health.

By including § 123 in the 1977 Amendments to the Act, Congress recognized that reliance on dispersion is a legitimate and necessary aspect of achieving compliance with the ambient standards and PSD increments at ground level. On the other hand, Congress was concerned that excessive reliance on dispersion might be used by regulated sources to avoid reducing the volume of pollutant emissions.[7] To preclude excessive reliance on dispersion, Congress in § 123 directed EPA to develop a program similar to one previously proposed by EPA in 1973[8] that would limit the use of dispersion "credit" to that provided by stack height conforming to "good engineering practice" ("GEP stack height").

GEP stack height is defined in § 123(c) of the Act as

> the height necessary to insure that emissions from the stack do not result in excessive concentrations of any air pollutant in the immediate vicinity of the source as a result of atmospheric downwash, eddies and wakes which may be created by the source itself, nearby structures or nearby terrain obstacles (as determined by the Administrator).

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ards) were released at ground level, they would create ambient concentrations of sulfur dioxide (SO_2) in the range of 900,000 micrograms per cubic meter in the vicinity of the source. By comparison, the primary (public health) ambient standard for SO_2 is 365 micrograms per cubic meter (24-hour calendar day average), and the Class II PSD increment is 91 micrograms per cubic meter (24-hour calendar day average). 40 C.F.R. §§ 50.4, 51.166(c) (1987).

[7] H.R. Rep. No. 294, 95th Cong., 1st Sess. 81-93 (1977).

[8] 38 Fed. Reg. 25697 (1973).

Congress explicitly limited GEP stack height to 2.5 times the height of the source ("2.5H"), unless the source owner or operator demonstrates, to the satisfaction of the Administrator, that a taller stack height is needed to ensure against excessive pollutant concentrations due to downwash. If such a demonstration of a taller stack height is approved by EPA, that demonstrated stack height is GEP stack height for the particular source.

The regulations defining the requirements for demonstrations of greater than 2.5H formula stack height are of primary importance here. The availability of these demonstrations, which are conducted in wind tunnel (fluid model) facilities using scale models of the source and surrounding terrain, are most important for sources in rugged terrain areas where downwash of source emissions can occur because of wind blowing over nearby terrain features.

II. EPA'S § 123 RULEMAKINGS

In January 1979, EPA proposed rules under § 123 governing demonstrations to establish GEP stack height credit greater than the 2.5H formula height.[9] Among other things, the 1979 proposal required sources conducting demonstrations to show the existence of a downwash-induced "excessive concentration," which was defined as a forty percent increase in ambient concentrations *and* an ambient standard or PSD increment "exceedance."[10] Under the 1979 proposal, as well as guidelines issued in 1981,[11] a source's actual or allowable emissions could be used in the wind tunnel demonstration.

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[9] 44 Fed. Reg. 2608 (1979).

[10] *Id.* at 2614. An "exceedance" is a term of art under the Act that means an ambient pollutant concentration that is greater than the concentration of the pollutant specified in the standard or increment.

[11] EPA-450/4-81-003, Guideline for Use of Fluid Modeling to Determine Good Engineering Practice Stack Height (June 1981).

During the late 1970s and early 1980s, three sources successfully conducted such demonstrations under EPA's supervision.[12] No party challenged these demonstrations, and no party in the 1979 rulemaking commented that anything other than a source's actual or allowable emissions be used in demonstrations.

In 1981, EPA reproposed § 123 rules that, *inter alia*, relaxed the definition of "excessive concentrations." In 1982, EPA promulgated a final rule requiring that a source only show a forty percent increase in downwash-induced ambient concentrations in order to establish GEP height above 2.5H formula height.[13] The final rules still allowed sources to use actual or allowable emissions in conducting demonstrations.

In 1983, the U.S. Court of Appeals for the D.C. Circuit remanded the 1982 definition of "excessive concentrations" to EPA on the ground that the forty percent test had not been adequately explained in reference to public health or welfare concerns.[14] In remanding the rule, the court suggested that the 1979 proposed definition, which included an ambient standard and PSD increment exceedance test, would pass muster if adopted on remand.[15] In the 1984 remand rulemaking, EPA, as urged by those who had challenged the 1982 rules [16] and as suggested by the court, proposed the same definition of "excessive concentrations" that it had proposed in 1979

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[12] *See, e.g.*, 47 Fed. Reg. 35784 (1982).

[13] 47 Fed. Reg. 5864, 5869 (1982).

[14] Sierra Club v. EPA, 719 F.2d 436, 450, 470 (D.C. Cir. 1983), *cert. denied sub nom.* Alabama Power Co. v. Sierra Club, 468 U.S. 1204 (1984).

[15] *Id.* at 470.

[16] *Id.* at 446 ("Petitioners NRDC and Sierra Club . . . urge a return to a standard like the one EPA originally proposed in 1979.").

(i.e., a forty percent increase in ambient concentrations *and* an ambient standard or PSD increment exceedance).[17]

Consistent with EPA's practice of allowing actual or allowable emissions to be used in demonstrations conducted under the 1979 proposed and 1982 final rules, EPA indicated in the preamble to the 1984 proposal that sources conducting demonstrations were to use the emission rate that "is applicable to the source being modeled."[18] Thus, if a source were subject to an ambient standard or PSD increment-based emission limit in a § 110 state plan, it would use that limit; if it were subject to a technology-based limit, such as an NSPS limit under § 111, it would use that limit.[19] No regulatory language relating to this preamble guidance was proposed and, unlike in other parts of EPA's preamble addressing different rulemaking matters,[20] no comments were solicited on the issue of whether anything other than applicable emission rates should be used.

EPA received extensive comments on the proposed rules from over 400 commenters. Of these numerous commenters, one group of commenters led by the Natural Resources Defense Council (NRDC) urged in their com-

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[17] 49 Fed. Reg. 44878, 44887 (1984), App. 170a-171a.

[18] *Id.* at 44882, App. 150a.

[19] *See id.* The NSPS, which are promulgated pursuant to § 111 of the Act, govern the emissions of pollutants emitted from *new* sources of a defined source type. The NSPS are not "applicable" to many of the sources subject to regulation under § 123.

[20] *See, e.g.*, 49 Fed. Reg. at 44881 (where EPA solicited comments on a definition of "excessive concentrations" that would include only the forty percent test, as an alternative to the proposed forty percent *and* ambient standard or PSD increment exceedance test), App. 147a; 44884 (where EPA discussed three different approaches for considering terrain features in fluid model demonstrations, and solicited comment on which approach should be adopted), App. 158a-159a.

ments on the proposal for the first time in the lengthy history of the § 123 rulemaking a new legal interpretation of § 123—an interpretation that would have fundamentally changed the Agency's approach to how sources must demonstrate an "excessive concentration."

NRDC argued that the word "necessary" in § 123 should be construed to require *all* sources (not just those conducting demonstrations to justify GEP credit above formula height) to apply "maximum available controls" (i.e., a stringent technology-based level of control) before any concentration could be deemed "excessive." Under NRDC's proposal, no stack height credit (even up to 2.5H formula height) would be allowed for any source unless the source first installed maximum available controls.[21] One other commenter, the Attorney General of New York, made the bare assertion, based on the legal theory advanced in the NRDC comments, that "EPA must direct that the emission rate to be assumed in determining whether an 'excessive concentration' will occur, must be the new source performance standard for the type of plant in question." [22]

In the 1985 final rules, EPA rejected NRDC's bizarre interpretation of § 123.[23] Consistent with the proposed rule, EPA provided in the final rule that the applicable emission rate would be used in demonstrations required to justify credit up to GEP formula height. However, for demonstrations conducted by sources seeking credit *above* formula height, EPA adopted an approach that was fundamentally different from the approach described in the preamble to the proposed rule.

In the final rule, EPA included, without reproposal providing notice and opportunity for comment, a totally

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[21] Comments of Sierra Club, Natural Resources Defense Council and Environmental Defense Fund at 5 *et seq.* (January 22, 1985).

[22] Comments of the Attorney General of the State of New York at 2 (January 8, 1985).

[23] 50 Fed. Reg. 27892, 27896 (1985), App. 87a-88a.

new regulatory requirement that all sources (even those not otherwise subject to NSPS) assume an NSPS level of control in any above-formula height demonstration. The only exception to this requirement would be if a source owner could show that compliance with the inapplicable NSPS would be "infeasible." [24] If such a showing could be made, EPA would purportedly allow another inapplicable technology-based limit ("best available retrofit technology" or "BART") to be used.[25]

Since EPA decided to adopt this new "NSPS presumption" rule in the eleventh hour, no record to support the factual basis for the rule was developed. Nevertheless, EPA found, as the basis for the rule, that "this [NSPS] limit can be met by all sources seeking to justify [GEP] stack heights above [2.5H] formula height." [26]

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[24] *Id.* at 27907, App. 132a. EPA did inform counsel for Alabama Power Co., *et al.* two weeks before the rules were signed that such a rule would be promulgated. Last-minute objections by these counsel, including the point that the "NSPS requirement was not in the proposed rules and has not been subject to public comment," were ignored by EPA. *See* Letter from Henry V. Nickel, Hunton & Williams, to Administrator Thomas (June 20, 1985). EPA did not inform Petitioners United Mine Workers of America or Ormet Corporation of this change.

[25] 50 Fed. Reg. at 27898 n.6, App. 96a.

[26] 50 Fed. Reg. at 27898, App. 96a. Since most sources that would seek to undertake fluid modeling demonstrations would be existing sources for which NSPS is not the "applicable" limit, the NSPS limit is likely not achievable by most sources subject to this provision. *Cf.* H.R. Rep. No. 294, 95th Cong., 1st Sess. 185 (1977) ("A third purpose of [NSPS] . . . [is] to achieve long-term cost savings. Building control technology into new plants at time of construction will plainly be less costly then requiring retrofit."); *id.* at 188 (given the additional costs associated with retrofit technology, "[a]ny revised [NSPS] requirement under section 111(b) would . . . be effective only prospectively."). The result would be that most sources would have to attempt to rebut the NSPS presumption and establish an alternative technology-based limit that EPA describes in its final rule as "best available retrofit technology" (BART). 50 Fed. Reg. at 27898 n.6, App. 96a. Sources unable to

III. THE D.C. CIRCUIT'S DECISION

Alabama Power Co., *et al.*, together with the National Coal Association, Ormet Corporation, and the United Mine Workers of America, petitioned for review of the "NSPS presumption" rule. On January 22, 1988, the D.C. Circuit affirmed the rule.

Regarding the allegation that EPA failed to provide adequate notice of and an opportunity to comment on the final "NSPS presumption" rule, the D.C. Circuit found that EPA's claim that the Agency had in fact proposed this rule was "quite disingenuous." [27] The court found "[n]othing in the initial formulation [to] suggest[] that EPA intended to adopt" a universally applicable NSPS requirement for above-formula height fluid modeling demonstrations.[28] Nevertheless, the court found that "industry" should have realized that there was "a clearly foreseeable risk that EPA would reject the environmentalists' reading of the law [to require use of maximum available controls] but proceed to adopt control-first" with respect to only the above-formula height demonstration requirement.[29]

Furthermore, the court felt that the New York Attorney General's comments "gave *industry participants* a clear opportunity to shoot the [NSPS presumption] idea down." [30] The court did not discuss the fact that there

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install NSPS or BART-type controls for economic or technological reasons would as a practical matter be precluded from undertaking fluid modeling demonstrations, even though § 123(c) of the Act imposes no such restrictions on such demonstrations. *See also infra* pp. 23-25.

[27] 838 F.2d at 1242, App. 31a.

[28] *Id.*

[29] *Id.* at 1243, App. 33a.

[30] *Id.* (emphasis added). The court also indicated that the actual notice provided by EPA to counsel for Alabama Power Co., *et al.* two weeks before the rules were signed provided "at least a limited

was a labor union (United Mine Workers of America) and an industry petitioner (Ormet Corporation) which did not file comments on the rulemaking proposal because the proposal did not include an NSPS presumption rule. These petitioners, therefore, were not constantly monitoring the rulemaking docket and were not aware of NRDC's and New York's comments.

Regarding the allegation that the Agency's failure to provide necessary record support for the rule was "arbitrary, capricious, [and] an abuse of discretion" under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), the court did not dispute that EPA had failed to support its factual finding that an NSPS rate "is attainable by most of the affected sources."[31] The court concluded, however, that "there is no need for any sort of generic demonstration" supporting this rule, since the rule "allows any source to use a higher emissions rate when NSPS is infeasible."[32] In other words, since the rule contained an "exceptions" procedure that might in some cases partially mitigate the harshest impacts of applying NSPS controls, the court found that there was no need to support the factual finding of "attainability" or otherwise to address the impact of the rule on regulated parties.[33]

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opportunity" for some of the petitioning parties to file last-minute objections. *Id.* Other litigants such as the United Mine Workers of America, however, did not receive even this last-minute notice.

[31] *Id.* at 1242, App. 30a.

[32] *Id.*

[33] Any mitigation would likely be only partial, since the rule would apparently still require a source to meet the lowest level of emissions control above NSPS which was "feasible," based upon a different technology-based standard ("best available retrofit technology"). 50 Fed. Reg. at 27898 n.6, App. 96a. The court failed to address arguments by petitioners below that this alternative standard also was not subject to notice and comment and lacked record support.

On March 7, 1988, Alabama Power Co., *et al.*, the United Mine Workers of America, and the National Coal Association filed a timely Petition for Rehearing and Suggestion for Rehearing *En Banc*. Both were denied on April 13, 1988. App. 65a-68a.

REASONS FOR GRANTING THE PETITION

In the early 1970s, rulemaking became "the mainstay for carrying out government programs. . . ." [34] Informal rulemakings have proliferated throughout the 1980s. Today, federal agencies are exercising broad rulemaking powers that affect every aspect of our economy and our society. The exercise of these broad informal rulemaking powers is subject to the procedures set forth in § 4 of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1982). At the heart of these procedures is the requirement that "notice of proposed rulemaking" be published in the *Federal Register* by the responsible agency.

Under the APA, "[a]gency notice must be sufficient to fairly apprise interested parties" of the substance of the proposed rule.[35] Section 4 of the APA therefore requires a description in the agency notice of the "terms or substance of the proposed rule or . . . of the subjects and issues involved." And it requires an opportunity for interested parties to present "views . . . or arguments" with respect to that proposed rule. Together, these requirements are intended to allow informal rulemaking to proceed in a fashion that is orderly and is fair to affected parties.

Since the APA was enacted, federal circuit courts have been working to settle how the language of this provision should be interpreted in cases where final rules differ from rulemaking proposals. As reflected in this case,

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[34] K.C. Davis, *Administrative Law Treatise*, Vol. 1, § 1.9, at 34 (2d ed. 1978).

[35] S. Rep. No. 752, 79th Cong., 1st Sess. 14 (1945).

the law of the D.C. Circuit has evolved in a manner that puts it at odds with Congress' intent in the APA and with the law of other circuits, including the Fourth Circuit's decision in *Chocolate Manufacturers Association of United States v. Block*.[36] As a consequence, the D.C. Circuit decision in this case will lead to unfair results, will perpetuate conflicts in the circuits, and will create confusion as to the standards that apply in future rulemaking proceedings.

Under the decision of the D.C. Circuit, the notice required by § 4 of the APA need not come from the agency itself, but rather may come from rulemaking participants. If allowed to stand, agencies will find authority in this decision to promulgate final rules that are not described in a rulemaking notice or are not raised as an issue in the notice, so long as a comment on the rulemaking proposal suggests such a final rule.

The D.C. Circuit decision will impose an almost impossible burden on all persons that have even a remote possibility of being potentially affected by the outcome of a rulemaking. Specifically, all who may be affected must monitor continuously the rulemaking docket (assuming there is one, since the APA has no requirement that a docket be kept) and prepare comments on any proposals offered by commenters. No longer can interested persons rely on the *Federal Register* to set the outer limits of potential effects; any comment in the rulemaking can expand the bounds.

As Chief Justice Rehnquist observed over eight years ago in dissenting with Justice Powell from an order denying certiorari, the question of what notice is adequate when a final rule differs from a proposal is "an issue of great importance, which cannot help but become greater as time goes on and more and more administrative proceedings are conducted . . . under the Adminis-

[36] 755 F.2d 1098 (4th Cir. 1985).

trative Procedure Act."[37] Accordingly, this question "is a recurring one that will ultimately require interpretation of [this] important [APA] statutory language by this Court." [38]

Rulemakings have proliferated as the Chief Justice predicted and, as the discussion below shows, the uncertainty surrounding the law on the procedural requirements that apply when final rules differ from proposals is greater now than it was eight years ago. Indeed, the law on this question has evolved into a true conflict in the circuits. Given the conflicting approaches of the circuits and the unique role of the D.C. Circuit in reviewing federal agency decisions, this Court should take the opportunity to address this "important statutory language" of the APA [39] and settle this basic principle of administrative law.

Finally, failure to give notice of a rule in the *Federal Register* will limit the extent to which a record supporting the rule can be developed through the rulemaking process. The D.C. Circuit, however, has held that record support for the factual finding asserted as the basis for a rule establishing a technology-based standard is not needed so long as an agency makes available an "exceptions" or "safety valve" procedure. This is contrary to the law of the Fourth Circuit announced in *E.I. du Pont de Nemours & Co. v. Train*.[40]

Under the holding of the D.C. Circuit, agencies will find authority to promulgate final rules without record support, so long as the regulation contains a procedure allowing an affected party to apply for some kind of an

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[37] Eli Lilly & Co. v. Costle, 444 U.S. 1096 (1980) (opinion of Rehnquist, J., with whom Powell, J. joined, dissenting from decision not to grant certiorari).

[38] *Id.* at 1098.

[39] *Id.*

[40] 541 F.2d 1018 (4th Cir. 1976), *aff'd in part, rev'd in part*, 430 U.S. 112 (1977).

exception to the rule. In combination with the lower court's holding that notice need not come from the agency, but may come from rulemaking commenters, this decision will lead to meager rulemaking records that create problems for agency decisionmakers and reviewing courts.

I. THIS COURT NEEDS TO RESOLVE A CONFLICT IN THE CIRCUITS AND SETTLE WHAT CRITERIA ARE TO BE APPLIED IN JUDGING THE ADEQUACY OF RULEMAKING NOTICE.

Today, administrative agencies execute their responsibilities principally through informal rulemaking.[41] This is reflected in the rapidly expanding area of energy and environmental regulation where legal and policy disputes are often substantial, issues are factually complicated and technically sophisticated, the affected interests typically include numerous private parties and the public generally, and the need for action is often compelling.

Due to the importance of the issues being resolved in rulemakings and the potentially huge costs to the American economy and labor force from new regulations, it is important now more than ever that affected interests perceive agency rulemakings to be conducted fairly. There must be opportunity for presentation, and proper consideration, of views.

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[41] K.C. Davis, *Administrative Law Treatise*, Vol. 1, § 1.9, at 34, § 61.1, at 448-49 (2d ed. 1978). While the choice between proceeding by general rule or individual adjudication to establish agency policy is one that lies primarily within the informed discretion of the agency, SEC v. Chenery Corporation, 332 U.S. 194, 203 (1947), the advantages of rulemaking over individual adjudication in the formulation of general regulations or agency policy have been recognized by this Court, agencies themselves, and various commentators. *E.g.*, United States v. Storer Broadcasting, 351 U.S. 192 (1956); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); Statement of Basis and Purpose of Trade Regulation Rule, 29 Fed. Reg. 8325, 8365-8369 (1965); Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. Pa. L. Rev. 485 (1970).

The APA's requirement that notice and an opportunity to comment be provided on legislative rules is basic to administrative law and the right of due process. The notice-and-comment procedure allows public participation in the administrative process, educates the agency, and establishes a rulemaking record. It is essential to informed and reasoned decisionmaking and effective judicial review.

The circuit courts agree that an agency may promulgate a final rule that differs in some respects from a proposed rule, whether in response to new data or to comments on the proposal.[42] The law of the circuits, however, is not settled concerning what constitutes adequate notice under § 4 of the APA when a final rule differs from the proposal.

Most circuits use a variant of the "logical outgrowth" test in assessing the adequacy of notice in this circumstance.[43] Considerable difference exists, however, concerning the scope and application of this test. The question that appears to be dividing the circuits involves the degree to which, under the "logical outgrowth" test, rulemaking comments can substitute for notice of a proposal in the *Federal Register*.

In applying the "logical outgrowth" test, the Fourth Circuit finds notice inadequate when the proposal de-

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[42] *See, e.g.*, National Cable Television Ass'n v. FCC, 747 F.2d 1503, 1507 (D.C. Cir. 1984).

[43] *See infra* note 50. In the Third Circuit, the adequacy of notice is "tested by determining whether it would fairly apprise interested persons of the 'subjects and issues' before the Agency." American Iron & Steel Institute v. EPA, 568 F.2d 284, 293 (3rd Cir. 1977), *cert. denied*, 435 U.S. 914 (1978). Two circuits, the Second and the Fifth, have recently cited to both the "apprise" test and the "logical outgrowth" test. National Black Media Coalition v. FCC, 791 F.2d 1016, 1022 (2nd Cir. 1986); United Steelworkers of America v. Schuylkill Metals, 828 F.2d 314, 317-18 (5th Cir. 1987). *But cf.* Brazos Electric Power Co-op v. SWPA, 819 F.2d 537, 543 (5th Cir. 1987) (stating that the circuit follows the "logical outgrowth" test).

scribed in the *Federal Register* "is replaced by a final rule which reaches a conclusion exactly opposite to that proposed, on the basis of comments received from parties representing only a single view of the controversy." [44] In the Fourth Circuit, therefore, notice is adequate only if the final rule is a logical outgrowth of the proposed rule published in the *Federal Register*. If comments suggest rules that are fundamentally different from those described in the *Federal Register* proposal, reproposal is required before the agency can adopt final rules that embrace those rulemaking comments.[45]

In sum, under the law of the Fourth Circuit, comments cannot cure a notice defect. In the Fourth Circuit, therefore, no obligation is imposed on rulemaking participants, or other potentially affected parties, to monitor the rulemaking comments.

By contrast, while the D.C. Circuit at times has discussed the "logical outgrowth" test in terms of the rulemaking proposal (and indeed continues to use this language in its opinions), the law in that Circuit has evolved to allow the court to inquire beyond the terms of the proposal itself. Thus, according to that court, while an agency may not generally "bootstrap notice from a comment," [46] it may do so where a rulemaking participant had *actual notice* of the comment.[47]

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[44] Chocolate Mfrs. Ass'n of United States v. Block, 755 F.2d 1098, 1103 (4th Cir. 1985) (footnote omitted); *see also* Kennecott Copper Corp. v. EPA, 780 F.2d 445, 452-53 (4th Cir. 1985), *cert. denied*, 107 S. Ct. 67 (1986) ("... an agency may not bootstrap new technologies from the comments ...").

[45] *See Chocolate Mfrs. Ass'n*, 755 F.2d at 1107.

[46] AFL-CIO v. Donovan, 757 F.2d 330, 340 (D.C. Cir. 1985), *citing* Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 549 (D.C. Cir. 1983).

[47] *Small Refiner*, 705 F.2d at 548, 549 ("Actual notice" of a proposal, even if not provided by the agency, would be sufficient to satisfy APA requirements); *see also* Union Oil Co. of California v. EPA, 821 F.2d 678, 683 (D.C. Cir. 1987) ("Our review *of the*

Moreover, in determining whether petitioners had notice, the D.C. Circuit has found that rulemaking participants are "obliged to take reasonable steps . . . to keep informed of EPA's thinking," where they are "aware generally" that the Agency may be considering significant changes to the proposed rule.[48] Accordingly, in the D.C. Circuit, a party can be considered to have received adequate notice of a rule if the party could have discovered through reasonable inquiry that an agency was considering a rule not contained in the proposal.[49]

The instant case takes the D.C. Circuit's interpretation of the APA notice requirements a step further, building on the "actual notice" and "reasonable inquiry" corollaries to the D.C. Circuit's version of the "logical outgrowth" test. Under this decision, not only is notice of a rule adequate if the specific rule is described in a rulemaking comment, but notice is adequate if the final

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record demonstrates that petitioners received actual notice sufficient to permit them to present their objections to the agency." (emphasis added)); Common Carrier Conference v. United States, 534 F.2d 981, 983 (D.C. Cir.), *cert. denied*, 429 U.S. 921 (1976) ("Even where there is a technical flaw in the notice, it can be overcome if the *actual conduct of the proceeding* provides notice to the participants of what is under contemplation." (emphasis added)).

[48] *Small Refiner*, 705 F.2d at 548. The court suggested that if petitioner had made an inquiry to EPA regarding the Agency's thinking, "EPA presumably would have informed it that other commenters had proposed" that the Agency adopt the rule in question, thereby providing notice. *Id.*

[49] *Id. Compare* 5 U.S.C. § 553(b) (1982), which provides that "[g]eneral notice of proposed rule making shall be published in the Federal Register, *unless* persons subject thereto are named and either personally served or otherwise have *actual notice thereof* [i.e., of the agency's proposal] *in accordance with law*" (emphasis added). In other words, under the APA, "actual notice" is an adequate substitute for notice in the *Federal Register* only if it is given by the agency *and* is otherwise "in accordance with law." Notice is "in accordance with law" under § 4 of the APA only if it describes the terms or substance of the proposed rule and the basis for that rule, and only if it is given to *all* affected parties, not just those who filed comments. *See* 5 U.S.C. § 553(b) (1982); *supra* pp. 11-12.

rule is a "logical outgrowth" of that rulemaking comment.[50] As a result, rulemaking participants will need to evaluate comments that suggest rules different from the proposed rule to determine what other rules that have not been proposed might grow out of those comments.[51]

Under this case, not only are rulemaking participants "obliged to take reasonable steps . . . to keep informed of EPA's thinking,"[52] but members of the public that

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[50] The First and Fifth Circuits seem to be following a variant of the logical outgrowth test that is similar to the D.C. Circuit's approach. According to the First Circuit, notice is adequate when the final rule is a logical outgrowth of "comments" filed during the rulemaking. Natural Resources Defense Council v. EPA, 824 F.2d 1258, 1283 (1st Cir. 1987) (" 'a logical outgrowth' of the notice and comment[s]"); BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 643 (1st Cir. 1979), *cert. denied sub nom.* Eli Lilly Co. v. Costle, 444 U.S. 1096 (1980) (indicating that final rule was "a logical outgrowth of industry's comments"). The Fifth Circuit focuses on whether the final rule was a logical outgrowth of the "published proceedings." Brazos Electric Power Co-op v. SWPA, 819 F.2d 537, 542 (5th Cir. 1987).

[51] Thus, in this case, EPA included in the preamble of its rulemaking proposal a statement that a source desiring to conduct a demonstration to establish GEP stack height above the 2.5H formula was to use its "applicable" emission rate. The final rule is *directly contrary* to the statement in the proposal that sources use their "applicable" emission rate. The final rule requires existing sources to use an emission rate in demonstrations that is not applicable. *See supra* pp. 9-10. The lower court found that the agency's proposal did not give notice of the NSPS presumption rule, *see supra* p. 11, but nonetheless found adequate notice on the grounds that two out of over 400 comments suggested an approach that provided the seed out of which the final rule grew. According to the lower court, notice was adequate because there was "a clearly foreseeable risk" that EPA would reject the legal theory underlying these comments, but adopt a rule that was a "logical outgrowth" of these comments. 838 F.2d at 1243, App. 33a. Since this rule was not included in the rulemaking proposal, however, there was no meaningful opportunity to comment on this rule, and important issues went unaddressed. *See infra* note 54.

[52] *Small Refiner*, 705 F.2d at 548.

were not even affected by the proposed rule would face similar obligations. In this case, for example, Petitioners United Mine Workers of America and Ormet Corporation did not file rulemaking comments because the Agency had not proposed the NSPS presumption rule. Nevertheless, these parties are equally bound by the lower court's holding that adequate notice can flow from two out of hundreds of rulemaking comments.[53]

If § 4 of the APA is read to limit the "logical outgrowth" test to notice given *by the agency* in the proposed rulemaking, then all interested parties will have a full and equal opportunity to understand and comment on the proposal. Due process will be satisfied.

By contrast, if a final rule can be a logical outgrowth of a comment that is inconsistent with the agency's *Federal Register* proposal, as the D.C. Circuit has held, notice to those satisfied with the proposal, and therefore not participating in the rulemaking (like the United Mine Workers and Ormet Corporation in this instance), would not be provided until the final rule was issued. No opportunity to be heard through comments would have been afforded.

In view of the foregoing, the D.C. Circuit's latest interpretation of § 4 of the APA has significant implications for the future conduct of informal rulemaking. Under the D.C. Circuit rule, anyone potentially affected by the outcome of a rulemaking proceeding (even if not specifically affected by the rule as proposed by the agency) will need to scour each rulemaking record searching for commenters' proposals that the agency might conceivably adopt. After this inquiry, they must guess as to the nature of the rule that might be adopted (since the final rule could be a logical outgrowth of those comments),

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[53] 838 F.2d at 1243, App. 33a.

and as to what the agency's basis for and purpose of any eventual rule might be.

In the final analysis, development of meaningful comments would require clairvoyance on the part of potentially affected persons. Any post-comment period comments formulated as a result of this process would be a fanciful exercise in speculation and their contribution to "reasoned decisionmaking" would be wholly fortuitous.

Obviously, to the extent someone affected by a final rule chose not to pursue this expensive and difficult search, or failed in the search, the agency would receive no comments on its final rule. In either instance, affected parties would be deprived of a meaningful opportunity to comment, and courts would have meager records on review of the final rule.[54]

Notice and comment rulemaking under the APA should not become an "insider's game." The fact that certain "industry" petitioners may have had the "opportunity to

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[54] The NSPS rule promulgated in this case demonstrates the importance of defining the "logical outgrowth" test in terms of the *agency's* notice. For instance, there are actually two different sets of NSPS that apply to one major type of source subject to § 123 (electric utilities), and in the future other types of sources will no doubt have more than one set of NSPS (since § 111 of the Act requires periodic revision of NSPS). Yet the "NSPS presumption" rule is silent on *which* NSPS should be used.

EPA also failed to explain why it chose NSPS, rather than some other inapplicable technology-based limit such as "reasonably available control technology." Some of these other technologies might have made more sense, since they take into account factors relating to the retrofit of equipment on existing sources.

Finally, in a footnote in the preamble to the rule, EPA refers vaguely to a guideline that it says it will use in assessing "infeasibility" showings. 50 Fed. Reg. at 27898 n.6, App. 96a. That guideline, developed in the context of an entirely different EPA program, raises a whole different set of issues which EPA could have addressed if notice and an opportunity for comment had been provided.

shoot the idea [presented in a comment] down" [55] should not excuse the fact that the United Mine Workers of America and others had no such opportunity.

For these reasons, certiorari should be granted in this case in order to resolve the conflict in the circuits on the question of whether the notice provision of the APA requires that final rules be a logical outgrowth of the agency's proposed rules, or allows final rules that are solely the outgrowth of a rulemaking participant's comments.

II. THE D.C. CIRCUIT'S HOLDING THAT A REGULATION CONTAINING AN "EXCEPTIONS" CLAUSE NEEDS NO RECORD SUPPORT CONFLICTS WITH THE LAW OF THE FOURTH CIRCUIT AND IS A RADICAL DEPARTURE FROM ESTABLISHED PRINCIPLES OF ADMINISTRATIVE LAW.

EPA's final NSPS presumption rule requires that existing sources that are not subject to NSPS apply this technology-based standard in any greater-than-formula height demonstration, with the result that they will have to achieve at least that level of control if the demonstration is successful. Since this rule was not proposed, no explanation or rulemaking record was developed to support it. Rather, EPA, in promulgating this rule, merely asserted as the factual basis for the rule the Agency's assumption that "this [NSPS] limit can be met by all sources seeking to justify [GEP] stack heights above [2.5H] formula height." [56]

Section 123 does not even suggest that EPA has authority to adopt technology-based standards. By contrast, Congress expressly provided for development of such standards in specified circumstances in several other sec-

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[55] 838 F.2d at 1243, App. 33a; *see supra* pp. 11-12.

[56] 50 Fed. Reg. at 27898, App. 96a.

tions of the Clean Air Act.[57] Those provisions require that, in developing such standards, EPA demonstrate that technology is "available" to meet the standard or that the standard is "achievable."[58] They also require that costs and environmental effects be considered to determine whether a technology is "best."[59]

These showings require that the Agency develop data on control technology performance, costs, and environmental consequences. The Agency must analyze those data to ensure, *inter alia*, "that variables [affecting equipment performance are] . . . accounted for, that the representativeness of test conditions . . . [are] ascertained, that the validity of tests . . . [are] assured and the statistical significance of results [are] determined."[60]

In contrast to the careful analysis required where Congress specifically provided for development of technology-based standards, the court below found that "there is no need for any sort of generic demonstration" on the achievability of the § 123 NSPS rule or on whether it reflects "best" technology for the existing sources subject to § 123. The Agency is excused from this kind of showing because, according to the court below, the rule allows a source "to use a higher emissions rate [albeit another

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[57] *See, e.g.*, CAA § 111 (providing for establishment of new source performance standards); § 169(3) (defining "best available control technology" requirements for new sources in attainment areas); § 169A(g)(2) (defining "best available retrofit technology" for certain existing sources subject to the Act's visibility program).

[58] For example, new source performance standards must be "achievable" based on "best adequately demonstrated" technology. PSD new source review requires examination of "best available control technology"; visibility standards focus on "best available retrofit technology."

[59] *Id.* *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 384-85 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

[60] National Lime Ass'n v. EPA, 627 F.2d 416, 452-53 (D.C. Cir. 1980).

inapplicable technology-based rate more stringent than current practice] when NSPS is infeasible." [61]

This holding represents a radical departure from how technology-based standards are set under the Clean Air Act, a departure that conflicts with the law of the Fourth Circuit.[62] More fundamentally, it represent an abrupt departure from established principles of administrative law governing the need for record support for agency rules.

Section 4 of the APA, 5 U.S.C. § 553(b), (c) (1982), requires agency notice of a proposed rule and an opportunity to comment on that rule so that, *inter alia*, an administrative record can be developed. Section 10(e) of the APA, 5 U.S.C. § 706 (1982), requires courts to base their review of agency rules on the record developed during the rulemaking proceeding. These requirements by the terms of the APA apply to *any* legislative rule, whether or not that rule contains an exceptions procedure.

According to the courts, these requirements are intended to ensure that agency rules are firmly based on facts substantially supported by the record, and that reviewing courts will be able to "determine whether the final agency decision reflects the rational outcome of the agency's consideration of all relevant factors . . . ." [63] Thus, a long line of cases make clear that when a rule is challenged on the grounds that there is no substantial support in

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[61] 838 F.2d at 1242, App. 30a.

[62] *See infra* p. 26. This departure is surprising in this case, given that § 123 of the Act, unlike other sections of the Act, does not contain any requirement that an existing source not subject to NSPS use NSPS or any other inapplicable limit in conducting demonstrations. Other than stating obscurely that use of an applicable emission rate "would amount to using a tall stack to justify itself," 50 Fed. Reg. at 27898, App. 97a, the Agency simply failed to address this issue.

[63] U.S. Lines v. Federal Maritime Commission, 584 F.2d 519, 533 (D.C. Cir. 1978).

the rulemaking record for a fact that is necessary to, or an asserted basis for, the rule, the rule must be set aside under the "arbitrary, capricious, [or] an abuse of discretion" criterion of 5 U.S.C. § 706(2)(A).[64]

The Fourth Circuit, in conflict with the D.C. Circuit in this case, has interpreted the APA to require substantial support in the rulemaking record for factual findings asserted as the basis for a rule, notwithstanding inclusion of a variance procedure in the rule. In *E.I. du Pont de Nemours & Co. v. Train*, the U.S. Court of Appeals for the Fourth Circuit reviewed, under § 10(e) of the APA, regulations that were "presumptively applicable" unless "that presumption is rebutted."[65] In reviewing those regulations, the Fourth Circuit held that "[t]he grounds upon which the agency acted must be clearly disclosed in, and sustained by, the record."[66]

Under the D.C. Circuit's new exception to the requirement for rulemaking records, by contrast, an agency could avoid having to develop a record supporting a rule

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[64] *See* Natural Resources Defense Council v. Herrington, 768 F.2d 1355, 1421 n.63 (D.C. Cir. 1985) ("an agency . . . [is] obliged to produce substantial evidence for its major assumptions in a rulemaking . . . ."); *Small Refiner*, 705 F.2d at 534 ("EPA retains a duty to examine key assumptions as part of its affirmative 'burden of promulgating and explaining a non-arbitrary, non-capricious rule' "), quoting *National Lime Association*, 627 F.2d at 433; Sierra Club v. Costle, 657 F.2d 298, 323 n.67 (D.C. Cir. 1981); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *accord*, United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 251-52 (2d Cir. 1977); Appalachian Power Co. v. Train, 545 F.2d 1351, 1356 (4th Cir. 1976). *See also* Recommendation 74-4 of the Administrative Conference, 1 C.F.R. § 305.74-4 (1988); Report of the Judiciary Committee on S. 1080, The Regulatory Reform Act, S. Rep. No. 97-284, 97th Cong., 1st Sess. 165-166 (1981).

[65] 541 F.2d 1018, 1028 (4th Cir. 1976), *aff'd in part, rev'd in part*, 430 U.S. 112 (1977).

[66] *Id.* at 1026.

simply by establishing, without notice and comment, a waiver provision that defines the conditions under which an affected party could attempt to argue in a subsequent proceeding that a less stringent rule should apply. Such rulemaking therefore could be insulated from meaningful public participation, and courts would be deprived of a record upon which to review such rules.[67]

The interests of both the public and the courts in having clear, well-reasoned agency decisions therefore will be frustrated by the lower court's holding—a holding that conflicts with the law of the Fourth Circuit. For these reasons, this Court should grant certiorari in this case.

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[67] The implications of the D.C. Circuit's holding are illustrated by its impact in this case. First, EPA's unsupported statement that the NSPS limit "can be met by all sources seeking to justify stack heights above formula height" is likely untrue, since NSPS were intended to be met by *new* sources that could be designed to incorporate the latest pollution control technology or to burn low-emitting fuels such as natural gas or low sulfur fuel oil. *See supra* note 26. Sources to which NSPS are *in*applicable cannot typically be retrofitted with such technology, and may need to be altered before burning different fuels.

Second, because EPA developed no record, the Agency nowhere considered the effect of its rule on the statutory right provided by Congress to conduct demonstrations. In effect, EPA has rendered the demonstration right worthless for all but a few sources that might be willing and able to retrofit NSPS or BART-type controls.

Finally, EPA developed no record support regarding the emission rate based upon another inapplicable technology-based standard (i.e., BART) that must be used if NSPS *is* shown to be "infeasible." Perhaps because there was no record on this point, the court simply failed to address this important issue raised by petitioners below.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the D.C. Circuit should be granted.

Respectfully submitted,

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June 17, 1988

SUPPLEMENTAL APPENDIX

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PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES OF INDIVIDUAL ELECTRIC UTILITIES

Alabama Power Company
(subsidiary of The Southern Company)

subsidiaries:

Alabama Property Company
Columbia Fuels, Inc.

affiliate:

Southern Electric Generating Company

Appalachian Power Company
(controlled by American Electric Power Company, Inc.)

subsidiaries:

Central Appalachian Coal Company
Central Coal Company
Central Operating Company
Kanawha Valley Power Company
Southern Appalachian Coal Company
West Virginia Power Company
Cedar Coal Company

Baltimore Gas and Electric Company

subsidiaries:

Safe Harbor Water Power Corp.
Constellation Holdings, Inc.

subsidiaries:

Constellation Biogas, Inc.
Constellation Investments, Inc.
Constellation Properties, Inc.

Boston Edison Company

Carolina Power & Light Company

subsidiaries:

Capitan Corporation
Carolina Power & Light Finance, N.V.

affiliate:

Carolinas-Virginia Nuclear Power Associates, Inc.

Central and South West Corporation

subsidiaries:

Central Power and Light Company
Public Service Company of Oklahoma

subsidiary:

Ash Creek Mining Company

Transok, Inc.
Southwestern Electric Power Company
West Texas Utilities Company
Central and South West Services, Inc.
CSW Financial, Inc.
CSW Energy, Inc.
CSW Leasing, Inc.
CSW Credit, Inc.

Central Hudson Gas and Electric Corporation

subsidiaries:

Phoenix Development Company, Inc.
Greene Point Development Corporation
Central Hudson Enterprises Corp.
CH Resources, Inc.
CH Cogeneration, Inc.

Central Illinois Light Company
(a subsidiary of CILCORP, Inc.)

subsidiaries:

CILCO Exploration and Dev. Co.
CILCO Energy Corporation

Central Illinois Public Service Company

affiliate:

Electric Energy, Inc.

The Cincinnati Gas and Electric Company

subsidiaries:

Union Light, Heat and Power Co.
West Harrison Gas & Electric Co.
Miami Power Corp.
Lawrenceburg Gas Co.
Lawrenceburg Gas Transmission Corp.
Tri-State Improvement Co.
YGK, Inc.

Columbus Southern Power Company
(controlled by American Electric Power Company, Inc.)

subsidiaries:

Colomet, Inc.
Simco, Inc.
Conesville Coal Preparation Co.

Commonwealth Edison Company

subsidiaries:

Commonwealth Edison Co. of Indiana, Inc.
Chicago and Illinois Midland Railway Co.
Cotter Corp.
Commonwealth Research Corp.
Edison Development Canada, Inc.

Edison Development Co.
Concomber, Ltd.

Consolidated Edison Company of New York, Inc.

Consumers Power Company

subsidiaries:

Michigan Gas Storage Company
Northern Michigan Exploration Company
Selective Collection Services, Inc.
Utility Systems, Inc.
Huron Hydrocarbons, Inc.

The Dayton Power and Light Company
(controlled by DPL, Inc.)

subsidiaries:

DP&L Community Urban Redevelopment Corp.
Miami Valley Development Company

Delmarva Power & Light Company

subsidiaries:

Delmarva Industries, Inc.
Delmarva Services Company
Delmarva Capital Investments, Inc.

subsidiaries:

DCI I, Inc.
DCI II, Inc.
Delmarva Capital Technology, Inc.
Delmarva Capitol Realty Company

The Detroit Edison Company

subsidiaries:

Edison Illuminating Company
Midwest Energy Resources Company

Washtenaw Energy Corp,
St. Clair Energy Corp.
SYNDECO, Inc.

Duke Power Company

subsidiaries:

Mill-Power Supply Co.
Crescent Land & Timber Corp.
Wateree Power Co.*
Catawba Manufacturing and Electric Power Co.*
Western Carolina Power Co.*
Caldwell Power Co.*
Southern Power Co.*
Greenville Gas and Electric Light and Power Co.*
Church Street Capital Corp.
Duke Engineering and Services

Florida Power Corporation
(controlled by Florida Progress Corporation)

Florida Power & Light Company
(wholly-owned subsidiary of FPL Group, Inc.)

subsidiaries:

Land Resources Investment Company
FPL QualTec, Inc.
Alandco, Inc.

Georgia Power Company
(subsidiary of The Southern Company)

subsidiary:

Piedmont Forrest Co.

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* Inactive

affiliate:

Southern Electric Generating Company

Gulf Power Company
(subsidiary of The Southern Company)

Illinois Power Company

subsidiaries:

IP Inc.
IPF Co., N.V.
Illinois Power Fuel Company

affiliate:

Electric Energy, Inc.

Indiana Michigan Power Company
(controlled by American Electric Power Company, Inc.)

subsidiaries:

Price River Coal Company
Blackhawk Coal Company

Indianapolis Power & Light Company
(controlled by IPALCO Enterprises, Inc.)

Iowa-Illinois Gas and Electric Company

subsidiary:

Iowa-Illinois Energy Co.

Iowa Public Service Company
(controlled by Midwest Energy Co.)

Kansas City Power and Light Company

Kentucky Power Company
(controlled by American Electric Power Company, Inc.)

Kentucky Utilities Company

subsidiary:

Old Dominion Power Company

affiliate:

Electric Energy, Inc.

Madison Gas and Electric Company

subsidiaries:

MG&E Nuclear Fuel Inc.
MAGAEL Inc.
MAGAEL Material Resources, Inc.
MAGAEL Communications, Inc.
Waters and Associates
Central Wisconsin Development Corp.

Mississippi Power Company
(subsidiary of The Southern Company)

Monongahela Power Company
(controlled by Allegheny Power System, Inc.)

affiliate:

Allegheny Generating Co.

Montaup Electric Company
(affiliated with Eastern Utilities Associates)

New England Power Company
(controlled by New England Electric System)

subsidiaries:

Massachusetts Electric Company
Narragansett Electric Company
Granite State Electric Company

Northern Indiana Public Service Company

subsidiaries:

Shore Line Shops, Incorporated
NIPSCO Exploration Co.
NIPSCO Fuel Co., Inc.
NIPSCO Energy Services, Inc.

Ohio Edison Company

subsidiaries:

Pennsylvania Power Co.
Ohio Edison Finance, N.A.

Ohio Power Company
(controlled by American Electric Power Company, Inc.)

subsidiaries:

Central Coal Company
Central Ohio Coal Company
Central Operating Company
Southern Ohio Coal Company
Cardinal Operating Company
Windsor Coal Company

Ohio Valley Electric Corporation

subsidiary:

Indiana-Kentucky Electric Corp.

Oklahoma Gas and Electric Company

affiliate:

Arklahoma Corporation

Pacific Gas & Electric Company

subsidiaries:

Natural Gas Corp. of California

subsidiary:

NGC Production Company

Gas Lines, Inc.
Alberta & Southern Gas Company, Ltd.
Calaska Energy Company
Standard Pacific Gas Lines, Inc.
Pacific Gas Transmission Company

affiliates:

ANGUS Biotech
ANGUS Chemical Company
ANGUS Petroleum Corp.
Alberta Natural Gas Company, Ltd.

affiliates:

ANGUS Biotech
ANGUS Chemical Co.
ANGUS Petroleum Corp.
Foothills Pipelines

subsidiaries:

Pacific Transmission Supply Co.
Rocky Mountain Gas Transmission Co.
Pacific Gas & Electric Gas Supply Co.

JWP Land Company
Pacific Gas and Electric Finance Company, N.V.
Alberta Natural Gas Company Ltd.
Pacific Conservation Services Company
Pacific Horizon Enterprises, Inc.

subsidiary:

Pacific Energy Services Co.

Pennsylvania Electric Company
(subsidiary of General Public Utilities Corp.)

subsidiaries:

Nineveh Water Co.
Waverly Electric Light & Power Co.

Pennsylvania Power & Light Co.

subsidiaries:

Pennsylvania Coal Resources Corp.

subsidiaries:

Brush Valley Coal Corp.*
Greene Manor Coal Company
Greene Hill Coal Company
Pemico Incorporated *
Pennsylvania Mines Corp.

subsidiaries:

Tunnelton Mining Co.
Rushton Mining Co.

CEP Group, Inc.

subsidiary:

Hanover Development Corp.

Interstate Energy Company
Safe Harbor Water Power Corp.
Realty Company of Pennsylvania

subsidiaries:

BDW Corp.
LCA Leasing Corp.
Lady Jane Collieries, Inc.

The Potomac Edison Company
(controlled by Allegheny Power System, Inc.)

subsidiaries:

Allegheny Generating Company
Allegheny Pittsburgh Coal Company

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* Inactive

Potomac Electric Power Company

subsidiaries:

PEPCO Enterprises, Inc.
Potomac Capital Investment Corp.

Public Service Company of Indiana, Inc.

Public Service Electric and Gas Company
(controlled by Public Service Enterprise Group, Inc.)

subsidiaries:

PSE&G Research Corp.
Mulberry Street Urban Renewal Corp.

Salt River Project

Southern California Edison Company

subsidiaries:

Associated Southern Investment Co.
Energy Services Inc.
Southern Surplus Realty Company
Calabasas Park Company, Inc.
Mono Power Company
Bear Creek Uranium Company
Associated Southern Engineering Co.
Mono Green Mountain Co.
S.C.E. Capital Co.
Mission Energy Co.
Mission Land Co.
Northern Cimarron Resources Co.
Mission Financial Management Co.

Tampa Electric Company
(controlled by TECO Energy, Inc.)

Toledo Edison Company
(controlled by Centerior Energy Corporation)

Tucson Electric Power Company

subsidiaries:

Valencia Energy Co.
Escavada Leasing Co.
Tucson Resources, Inc.
Tusconel Inc.
Sierrita Resources, Inc.
San Carlos Resources, Inc.

Union Electric Company

subsidiary:

Union Colliery Company

affiliate:

Electric Energy, Inc.

Virginia Electric and Power Company
(controlled by Dominion Resources, Inc.)

West Penn Power Company
(controlled by Allegheny Power System, Inc.)

subsidiaries:

Allegheny Generating Company
Allegheny Pittsburgh Coal Company
West Virginia Power & Transmission Co.

subsidiary:

West Penn West Virginia
Water Power Co.

Wisconsin Electric Power Company
(controlled by Wisconsin Energy Corporation)

Wisconsin Power and Light Company

subsidiaries:

South Beloit Water, Gas and Electric Co.
Wisconsin Power and Light Nuclear Fuel, Inc.

NUFUS Resources, Inc.
Residuals Management Technology, Inc.
ENSERV, Inc.
REAC, Inc.
WP&L Holdings, Inc.
WP&L Communications, Inc.

Wisconsin Public Service Corporation

affiliates:

Wisconsin River Power Company
Wisconsin Valley Improvement Company
Delores Bench General Partner, Inc.
WPS Development, Inc.
WPS Communications, Inc.